NOT FOR PUBLICATION WITHOUT
THE APPROVAL OF THE COMMITTEE ON OPINIONS

STATE OF NEW JERSEY,

Plaintiff,

v

HARLEY V PHILLIPS,

Defendant

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION (CRIMINAL)
CUMBERLAND COUNTY
APPEAL NO 99-76

STATE OF NEW JERSEY

Plaintiff

v

DAVID SEAY,

Defendants

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION (CRIMINAL)
CUMBERLAND COUNTY
APPEAL NO 91-76

STATE OF NEW JERSEY,

Plaintiff,

v

MATTHEW S SMITH,

Defendant

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION (CRIMINAL)
CUMBERLAND COUNTY
APPEAL NO 95-76

STATE OF NEW JERSEY,

Plaintiff

v

CLARENCE WELDEN,

Defendant

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION (CRIMINAL)
CUMBERLAND COUNTY
APPEAL NO 93-76

Civil Action

OPINION

Argued September 19, 1977 Decided November 1, 1977

Mr Charles E Viel for defendants Phillips, Smith and Weldon (Harry R Adler, attorney)

Mr David C Harper for defendant Seay

Mr Kevin P McCann, Assistant County Prosecutor for plaintiff (William F Doherty, Prosecutor of Cumberland County, attorney)

PORRECA, J C C (temporarily assigned)

These are four appeals from four separate sentences imposed by the municipal courts of Downe Township and Upper Deerfield Township after the courts found the defendants guilty of violating N J S A 39 4-50 Each of the four defendants contends that the trial court erred in holding him to be a subsequent offender under the statute (N J S A 39 4-50) as amended by L 1977 c 20 effective May 25, 1977, by reason of his conviction under the statute prior to this amendment The issue before this court on appeal is whether a defendant convicted for driving a motor vehicle while impaired by the consumption of alcohol (N J S A 39 4-50(b) of the statute prior to the 1977 amendment) should be deemed to be convicted of a prior violation of the current statute and thus sentenced as a subsequent offender This court holds that the subsequent offender provision is properly invoked

The defendants now before this court are Phillips, Seay, Smith and Welden A statement of the essential facts respecting each is in order

Phillips On March 22, 1977, defendant Phillips was convicted of a violation of N J S A 39 4-50(b) under the statute as it existed prior to the 1977 amendments, driving a motor vehicle while his ability was impaired by the consumption of alcohol The date of the offense was December 4, 1976 In accordance with N J S A 39 4-50 7 the defendant requested to be sentenced under the provisions of the current statute On June 7, 1977, the defendant was sentenced under the current statute as a second offender because the defendant had been convicted in 1967 of driving a motor vehicle while his ability was impaired by the consumption of alcohol in violation of N J S A 39 4-50(b)

Seay On April 9, 1977, defendant Seay was arrested and charged with violating N J S A 39 4-50(b), operating a motor vehicle while his ability was impaired by the consumption of alcohol On June 7, 1977, he plead guilty and requested to be sentenced under the current statute He was sentenced as a second offender by reason of a prior conviction in May 1977 in which he was found to have violated N J S A 39 4-50(b) under the prior statute

Smith On June 15, 1977, the defendant Smith was found guilty of driving a motor vehicle while under the influence, N J S A 39 4-50(a) The date of the offense was April 8, 1977 The defendant requested to be sentenced in accordance with the penalties of the current statute He was sentenced as a third offender since the defendant had two prior convictions under the drinking-driving law as it existed before the 1977 amendments

One conviction was for driving a motor vehicle while under the influence of intoxicating liquor, N J S A 39 4-50(a) and the other was for driving a motor vehicle while his ability was impaired, N J S A 39 4-50(b)

Welden Defendant Welden was arrested on February 5, 1977, and charged with driving a motor vehicle while under the influence of alcohol in violation of N J S A 39 4-50(a) On March 16, 1977, Welden was convicted as charged, however, the imposition of a sentence was deferred until after May 25, 1977, the effective date of the current statute The defendant was sentenced as a third offender since the defendant had been convicted on two prior occasions of driving a motor vehicle while his ability was impaired, N J S A 39 4-50(b)

This issue arises because N J S A 39 4-50 as it existed before the 1977 amendments provided for two types of offenses respecting the operation of a motor vehicle after a defendant has consumed alcohol Subsection (a) of that statute concerned the more serious offense of driving while under the influence of intoxicating liquor, while subsection (b) was directed at the lesser offense of driving while his ability was impaired by the consumption of alcohol This statute as amended, May 1977, eliminates the (a) and (b) distinctions and provides for a single drinking-driving offense

The defendants contend that the Legislature could not have intended a subsection (b) violation to be considered by the courts as a prior conviction when sentencing a defendant under the current statute and that to hold otherwise would be a violation of both the New Jersey and Federal Constitutions which prohibit

the passage of ex post facto laws Defendants argue that when the Legislature passed the current statute, it abolished the two drinking-driving offenses which distinguished between an (a) violation, under the influence, and a (b) violation "impaired," and retained only the (a) violation Defendants see support for this contention in the fact that the Legislature retained language substantially similar to that of the prior subsection (a) violation, to wit, "under the influence

An equal argument can be advanced supporting the abolition of the (a) offense and the retention of the (b) offense on the grounds that the BAC (blood alcohol content) standards and presumptions in the current statute (N J S A 39 4-50 6) are those amounts applicable to the (b) offense of the prior statute N J S A 39 4-50 6 Both of these arguments must fail If the Legislature intended to retain one of the prior offenses and abolish the other, it could have clearly expressed such an intent It did not For the reasons stated herein, it is clear that the Legislature intended to abolish both the (a) and (b) offenses and establish a single drinking-driving offense In the alternative, defendants argue that when the Legislature abolished the two drinking-driving offenses of the prior statute and established a single drinking-driving offense, the repeated use of the phrase, under the influence,' together with the fact that the current statute remains silent as to what drinking-driving convictions are to be considered as prior convictions under the present law demonstrate a legislative intent to consider only prior (a) under the influence, convictions as well as any convictions under the current statute

The defendants further argue that the current statute is an attempt to reduce alcohol-related traffic fatalities by reducing the penalties thereunder and providing rehabilitative and educational programs

Our Appellate Division, in reviewing the affect of the 1966 amendments to this statute, recognized that the policy considerations of the N J S A 39 4-50, whether in the form as it existed prior to the 1966 amendments or as it existed thereafter, were concerned with the same kind of unlawful conduct and directed against the same evil, the operation of a motor vehicle by one who is in such a condition that it may affect the safety of others as well as that of the operator State v Sturn, 119 N J Super 80 (App Div 1972) These policy considerations have remained essentially the same up to the present and are reflected in the 1977 amendments

In passing the 1977 version of N J S A 39 4-50, the Legislature recognized that punishment alone was not effective in deterring motor vehicle drivers from drinking and driving In spite of mandatory jail terms, license revocation and fines, recidivism and auto accidents are on the rise To this end N J S A 39 4-50(b) requires an offender to satisfactorily complete an alcohol educational and rehabilitative program as a prerequisite to the restoration of driving privileges In addition, the current statute has been altered to allow the court discretion in imposing a term of imprisonment and the manner in which it is to be served

However, the intent of the current statute is not, as argued by the defendants, to reduce the importance of punishment for violators of our drinking-driving laws Rather, it provides for

the treatment and rehabilitation of the offender in addition to the punitive aspects which have always been a part of this law See N J S A 39 4-50(b) of the current statute which provides

> In addition to any other requirements provided by law, a person convicted under this section must satisfy the requirements of a program of alcohol education or rehabilitation (Emphasis supplied)

The statute continues to provide for the imposition of jail terms, license revocations and fines, and contains provisions for the imposition of additional penalties for subsequent offenders Before the recent amendments the act provided for two grades of punishment one for the first offender and a second for the subsequent offender The current statute provides for the imposition of penalties on three different tiers, first offender, second offender and third or subsequent offender The penalty for a third or subsequent offender carries with it a fine of $1,000, a license revocation for a period of five years and possible imprisonment for up to 180 days, a period of incarceration longer than that provided by the prior law

The progressive penalties placed upon subsequent offenders, the provision for longer jail terms and the new three sentencing tiers evidence a lack of a legislative intent to deemphasize the punitive aspects of the act They do, however, express a continued concern to establish a deterrent and preventative sanction to be employed against those whose continued disregard for the safety or the welfare of other members of the public is manifested by a second or third conviction of the same nature State v Storm, supra, 119 N J Super at p 82

The elements of the offense as it existed under the original statute are the same as those present in the amended

law The degrees or standards of proof including the stated legal presumptions respecting the amount of alcohol in the defendants' bloodstream and its correlation to the presumption that the defendant is under the influence of intoxicating liquor are not greater than those required under the impaired section of the prior statute

Where the elements of an offense under an amended statute are the same as those that existed prior to the amendments, where both statutes continue to address the same unlawful conduct, and where the legislative policies and intentions remain substantially unchanged, such as is the case here, it would be incongruous to hold that the Legislature intended to preclude the invocation of the subsequent offender provisions where the defendant was convicted of an offense under the original statute and is later convicted under the amended law This is especially true where the amendments do not result in a change in the elements or nature of the offense but merely reflect a modification in manner and method of sentencing

This court finds no valid reason to accept the defendants' contentions that they should not be penalized as subsequent offenders under the current statute

It is further argued that to use a prior (b) conviction to invoke the subsequent offender penalties provided by the current statute is a violation of the ex post facto provisions of the Federal and State Constitutions This argument is without merit

Subsequent offender provisions such as the one in effect here, do not undertake to punish again for the prior offenses The prior offense merely provides a background to be considered

in sentencing for a subsequent offense The gravity of the punishment is increased by the persistence of the defendant in the unlawful conduct, conduct which brings him into a class established by law as deserving and requiring a more severe punishment and restraint than he would otherwise receive State v Rowe, 116 N J L 48 (Sup Ct 1935), aff'd 122 N J L 466 (E & A 1939), In re Zee, 13 N J Super , 312 (Cty Ct . 1951), State v Sturn, supra

The ground upon which these statutory provisions is bottomed is that punishment is imposed for the second offense only and that in determining the amount and nature of the penalty to be inflicted, the Legislature may require the court to take into consideration the recidivous nature of the defendant's conduct Our courts have long recognized the ability of the state to deal with and reach subsequent offenders of our drinking driving laws (See State v Rowe, supra , In re Zee, supra , State v Sturn, supra) The current statute is no more violative of the constitutional safeguards than the drinking-driving laws discussed in the cases cited

Therefore, a person convicted under the current statute is a subsequent offender if he has heretofore been convicted under either section, (a) or (b), of the prior statute